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IN THE TEXAS COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

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KAITLYN RITCHERSON

Petitioner

v.

THE STATE OF TEXAS,

Appellee

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Petitioner's Merits Brief on Discretionary Review
to the Texas Court of Criminal Appeals
from the Third District Court of Appeals
in 03 –13–00804–CR

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Submitted by

Law Office of Alexander L. Calhoun
4301 W. William Cannon Dr.,
Ste. B-150 # 260
Austin, Texas 78749
tele: 512/731 - 3159
fax: 512/233-5946
Email: alcalhoun@earthlink.net

On Briefs Only - Oral Argument Denied

CERTIFICATE OF PARTIES

Pursuant to Rule 38.1(a), Tex.R.App. Pro., Petitioner presents the following persons who are parties to, or have an interest in the final judgment in this cause, so that the Court may determine whether its members are disqualified or should recuse themselves:

Mr. Alexander L. Calhoun, App. Atty	4301 W. William Cannon Dr., Ste. B -150 # 260, Austin, TX 78749
Mr. Charles Baird & Amber Farrelly, Trial Attorneys	2312 Western Trails Blvd., Ste. 102A Austin, Texas 78745
Ms. Margaret Moore, Dist. Atty	Blackwell-Thurman Criminal Justice Complex, 509 W. 11th St, Austin, TX 78701
Mr. Gary Cobb, (Former) Asst. Dist, Mr. Jason English Asst. Dist. Atty	Blackwell-Thurman Criminal, Justice Complex, 509 W. 11th St, Austin, TX 78701
Judge Robert Perkins (Ret.)Trial Judge	Blackwell-Thurman Criminal Justice Complex, 509 W. 11th St, Austin, TX 78701

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Statutes and Rules:

TO THE TEXAS COURT OF CRIMINAL APPEALS:

COMES NOW, Petitioner, KAITLYN RITCHERSON, who, by and through her undersigned attorney of record, presents this brief on merits following this Court's grant of discretionary review, and would show as follows:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner was charged by indictment with murder, in violation of Tex. Penal Code § 19.02 (b)(1) & (2). [Clerk's Record ("C.R."): 20 - 21]. After her first trial ended in a mistrial due to a jury deadlock, she was convicted on retrial of the offense as charged in the indictment. [C.R.: 295, 306, 307 - 308; 19 Reporter's Record ("R.R."): 5]. At punishment, the jury assessed a sentence of 25 years incarceration in the Texas Department of Criminal Justice – Institutional Division. [C.R.: 305, 306, 307 - 308].

The Third District Court affirmed Appellant's conviction in a published opinion. *Ritcherson v. State*, 476 S.W.3d 111 (Tex. App. – Austin 2015). Petitioner did not file a Petition for Discretionary Review, but following a post-conviction writ of habeas corpus, this Court granted an opportunity to file a petition for discretionary review. *Ex parte Ritcherson,* WR-85, 928-01 (Tex.Cr.App. Nov. 16, 2016).

This Court subsequently granted the petition for discretionary review. This merits brief was initially due by June 2, 2017, but the deadline was extended to June

19, 2017. The merits brief is presently overdue and is being filed subject to a pending second motion for extension.

ISSUE PRESENTED

THE COURT OF APPEALS FAILED TO APPLY THIS COURT'S DECISION IN *Saunders v. State*, 840 S.W.2d 390 (Tex.Cr.App. 1992) IN DETERMINING THAT PETITIONER WAS NOT ENTITLED TO A LESSER-INCLUDED CHARGE ON MANSLAUGHTER WHEN THE JURY COULD REASONABLY HAVE INTERPRETED PETITIONER'S *MENS REA* AS RECKLESSNESS ABOUT CAUSING DEATH.

STATEMENT OF FACTS

The instant case arose from a confrontation outside of Republic Live, a night club in the downtown entertainment district of Austin, shortly after closing hours on December 4, 2011.

The accounts of the confrontation between Petitioner and the decedent varied widely at trial. Kelvin Jones, along with several of his friends went to the club late on December 3, 2009; his fiancee, Jamie Hopkins, and her friend, the decedent went separately. [22 R.R.: 11, 14, 15]. At the club, a verbal argument broke out and continued outside after the club closed and emptied. [22 R.R.:14, 16 - 24, 57, 59]. After overhearing a girl make a provocative comment outside the club, Jones decided to move his fiancee and the decedent out of the area before the confrontation escalated. [22 R.R.: 26, 68 - 69]. He picked up Hopkins and turned her around so they could make their way from the disputants, then did the same for the decedent.

[22 R.R.: 26, 28, 29, 71 - 72]. The decedent had been swinging at an opposing girl in a red dress as Jones grabbed for the decedent to move her away, she had been swinging at a girl in a red dress. [22 R.R. 92 - 93, 95, 114]. The three, Jones, Hopkins and the decedent, started walking down the street, but the decedent collapsed to the sidewalk bleeding after taking only a few steps. [22 R.R.: 25 - 29, 30 - 31, 71 - 72]. Jones had not observed the decedent stabbed, nor seen her assailant with a knife. [22 R.R.: 18, 31, 95].

Jaime Hopkins testified in the early morning of December 4, she and the decedent encountered a group of individuals arguing outside of the club they had attended. [21 R.R.: 164 - 176]. Hopkins felt threatened by individuals in the crowd and as she started to walk away, someone pulled her hair. [21 R.R.: 178 - 184]. Her fiancee, Kelvin Jones, suddenly appeared and moved her to one side. [21 R.R.: 189 - 192]. As she was being moved, Hopkins observed Petitioner waiving a small knife in the air. [21 R.R.: 192 - 193, 219 - 220, 261]. Hopkins' fiancé also picked up and moved the decedent away from the throng, and the three started walking away. As they walked, the decedent stumbled and collapsed to the sidewalk [21 R.R.: 196]. Hopkins had not seen the stabbing. She insisted that neither she nor the decedent had been aggressive nor had she seen the decedent strike at Petitioner. [21 R.R.: 204, 210, 211, 230 - 231, 255, 262].

"Shermay" Uwahlogho, a photographer at the club, noticed two groups outside the club arguing after closing time. [22 R.R.: 211, 216, 217 - 218]. In the crowd, she observed Petitioner holding a raised knife, but then lower it after another individual restrained her and calmed her down, after which she disappeared from Uwahlogho's sight. [22 R.R.: 218 - 220, 229, 239, 259, 263, 266 - 267]. Uwahlogho did not see any physical confrontation between the Petitioner and anyone else. [22 R.R.: 222, 242, 264].

Stefne Henderson and a friend were outside the club at closing waiting to board a party bus. [23 R.R.: 14, 18]. She noticed that Petitioner among a group of individuals, including Chris Carson and Ryan Moore, who were arguing loudly with another group. [23 R.R.: 20 - 25, 73, 75, 80]. Petitioner started arguing with a woman, and then moved over to argue with another woman, the decedent. [23 R.R.: 85, 86, 89 - 90]. The two approached each other, but the decedent stopped, turned, and started walking away. [23 R.R.: 32, 44]. As the decedent left, Petitioner reached over her right shoulder and stabbed her in the chest. [23 R.R.: 47 - 48, 52, 94 - 95, 97 - 98, 100, 124 - 125, 135]. The decedent walked a few steps and then fell to the ground. [23 R.R.: 50, 101]. She had not touched Petitioner prior to being stabbed. [23 R.R.: 101, 121].

Ashley York, a former friend of Petitioner, testified that she met up with

Petitioner, who had come to the club to pick up a mutual friend who had been ejected from the club. [23 R.R.: 148 - 149, 152 - 153, 154, 156 - 157,239]. A group, including their friend, Chris Carson, was outside the club arguing with another group. [23 R.R.: 159, 294]. Some girls in the other group, including the decedent, joined into the argument; Petitioner, who was in the other group was drawn into the argument with the decedent. [23 R.R.: 161 - 164, 167, 223, 278, 294, 295]. York observed Petitioner with a knife in her hand. [23 R.R.: 176 - 177, 179, 191, 228, 303]. The decedent abruptly lunged at Petitioner, striking her in the head with a cell phone. [23 R.R.: 164 - 166, 170, 184, 188 - 189, 224, 229, 240, 243, 251 - 252, 278, 282, 289]. York departed the scene without watching more and walked to her car in a nearby lot. Petitioner shortly caught up with her; she had a knot on her forehead, blood on her hand, and a stab wound in her thigh. [23 R.R.: 192 - 194, 195 - 196, 199, 230, 282 - 283, 290 - 291]. York had not seen Petitioner assault the decedent. [23 R.R.: 240].

Chris Carson was outside the club arguing with another club patron. [25 R.R. 227 - 229, 233 - 240]. As the argument between the two groups grew tense, Carson saw the decedent suddenly approach with her arm raised, holding what appeared to be a high heeled shoe, and strike Petitioner in the head. [25 R.R.: 241 - 242, 272 - 276]. After striking Petitioner, the decedent appeared to slip on the ground, but

recovered, and she and Petitioner then "crash[ed] into each other." [25 R.R.: 243 - 244, 278, 280]. Carson saw the decedent, holding a high heeled show in her raised hand, again approach Petitioner. [25 R.R.: 280]. He did not see Petitioner with a knife as she engaged the decedent. [25 R.R.: 280]. After the two crashed into each other, the crowd surged around them, obscuring Carson's view from further confrontation. [25 R.R.: 244 - 245, 281].

Carson's younger sister, Britney Carson, was also present at the argument. She observed Ashley York arguing with another group of girls as Petitioner stood by. [26 R.R.: 308, 309 - 310; 27 R.R.: 31]. Several girls suddenly lunged toward York and Petitioner. [26 R.R.: 311]. The decedent struck Petitioner in the forehead with her cell phone, stumbled and fell, but regained her footing. [26 R.R. 311 - 313; 27 R.R.: 45 - 46, 49 - 51,53, 104]. Britney saw that Petitioner had a knife in her right hand and appeared frightened. [26 R.R.: 314; 27 R.R.: 55, 56, 59, 103]. The decedent, still holding her cell phone raised as a weapon, again threatened Petitioner, and her group surged toward Petitioner and York. [26 R.R.: 314 - 315; 27 R.R.: 61 - 62, 63, 64, 106]. Britney's view of Petitioner and the decedent was blocked as the groups rushed together. [25 R.R.: 315; 27 R.R.: 65 - 66, 108].

Ryan Moore, Ashley York's fiancee, testified that he, Chris Carson and another friend were outside the club; Carson was continuing an argument with

another club patron. [27 R.R.: 137, 146 - 147, 149 - 153, 157]. The decedent and a friend were with the opposing group and joined in the confrontation. [27 R.R.: 161, 212 - 213]. During the argument, the decedent abruptly removed her shoe and attempted to strike Petitioner. She restrained by a friend, but broke free and lunged a second time, striking Petitioner in the forehead with an object. [27 R.R.: 164 - 166, 168, 170 - 171, 172, 173, 174 - 175, 200 - 202, 218, 219, 245]. Petitioner reacted reflexively by swinging back at the decedent. [27 R.R.: 173, 176, 219, 224]. Moore grabbed Petitioner, discovering that she had a knife in her hand, and had stabbed the decedent [27 R.R.: 176 - 177, 219, 221 - 222, 231, 233]. He forced the knife out of Petitioner's hand to the ground, and kicked it away. [27 R.R.: 178, 180, 185, 222, 239]. Petitioner appeared "shocked or confused" by what had happened, and then wandered off in York's direction. [27 R.R.: 181 - 182, 222].

The knife was not recovered and accounts of its size varied: Shermay Uwahlogho described it as having a 4-inch blade, 22 R.R. 200, 202, 204; Jamie Hopkins testified it had a 2 ½ inch blade, 21 R.R.: 232; Stefne Henderson described it as having a 6-inch blade, 23 R.R.: 96, 125 - 126; Britney Carson characterized it as a "small knife" with about a 2 ½ inch blade, 27 R.R. 99, 106; and Ryan Moore described it as a "little knife," being 4 ½ to 5 inches from handle to tip. [27 R.R.: 178 - 179, 228].

Petitioner was arrested and questioned later that morning. She stated that she had been downtown when a fight erupted; she felt a pinch in her leg and discovered she had been stabbed. [24 R.R.: 266 - 267, 268, 285; State's Exhibit 40A]. In a subsequent interrogation, she admitted that she had participated in a verbal altercation with another girl. [25 R.R.: 230 - 231, 242; State's Exhibit 79]. The girl came at her struck her. [25 R.R.: 239, 249 - 250]. Petitioner was also stabbed, and heard someone alert the crowd about someone having a knife. [25 R.R.: 239 - 240].

The medical testimony indicated that the decedent died of complications from a single stab wound to the chest. [22 R.R.: 123, 125 - 126, 135 - 136, 141 - 142]. A forensic pathologist concluded the decedent had died after receiving "sharp force injury" – a stab wound to the chest, which caused blood loss to the brain. [24 R.R.: 208, 214, 219, 225]. The injury went from less than 2 centimeters down to 0.5 centimeters. [24 R.R.: 208, 231]. The pathologist could not determine the size of the knife. [24 R.R.: 230, 233]. She agreed with the leading question that the act of stabbing a person in the chest with a sharp object was "an act that's clearly dangerous to human life," but she could not conclude that the injury had been inflicted with the intent to cause death. [24 R.R.: 221].

During the charge conference, the trial court denied Petitioner's request for a lesser-included instruction of Manslaughter. [27 R.R.: 255 - 257]. The resulting

jury charge authorized the jury either to convict Petitioner of murder or acquit her out right. [C.R.: 286 - 296]. The jury convicted Appellant of murder as charged in the indictment. [C.R.: 295].

SUMMARY OF THE ARGUMENT

The Third Court of Appeals incorrectly analyzed whether Appellant was entitled to a lesser-included offense instruction of manslaughter. The court neither recognized nor applied the correct standard of review under *Saunders v. State*, 840 S.W.2d 390 (Tex.Cr.App. 1992), which prompts an evaluation of whether the evidence may give rise to a jury's reasonable alternative interpretation of the evidence to support a conviction of a lesser-included offense. Additionally, the court of appeals applied an erroneous evidentiary sufficiency review in favor of the guilty verdict instead of an evaluation of the evidence in the light most favorable to the defense. In light of these, the court entirely failed to address whether the evidence might support the jury's determination whether Petitioner's *mens rea* had been one of recklessness, rather than the specific intent to kill or cause serious bodily injury, as well as emphasized the evidence that supported the denial of a lesser-included offense instruction, instead of the evidence which might support an instruction under *Saunders*.

GROUND FOR REVIEW (RESTATED)

THE COURT OF APPEALS FAILED TO APPLY THIS COURT'S DECISION IN *Saunders v. State*, 840 S.W.2d 390 (Tex.Cr.App. 1992) IN DETERMINING THAT PETITIONER WAS NOT ENTITLED TO A LESSER-INCLUDED CHARGE ON MANSLAUGHTER WHEN THE JURY COULD REASONABLY HAVE INTERPRETED PETITIONER'S *MENS REA* AS RECKLESSNESS ABOUT CAUSING DEATH.

A. A lesser-included offense instruction is required when the jury could reasonably interpret the evidence before it to support a lesser-charge, not when the evidence forecloses conviction of the charged offense.

A defendant is entitled to an instruction on a lesser-included offense when proof of the lesser-charge is included within the greater charge, and there is some evidence at trial which, if believed by the jury, would allow them to rationally convict the defendant only of the lesser charge. *Bullock v. State*, ___ S.W.3d ___, ___, No PD-1453-15, slip op. at 5 (Tex. Cr. App. 2016); *and*, *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Cr. App. 2011) ("The evidence must establish the lesser-included offense as "a valid, rational alternative to the charged offense") (internal quotations omitted). *See also*, Tex. Code Crim. Pro. Art. 37.09.

But whether a lesser-charge provides a rational *valid* alternative for conviction is not contingent upon a strict conviction-acquittal analysis of the evidence. In *Saunders v. State*, this Court explained that the proof to support a lesser-charge could arise under two alternatives: (1) where evidence affirmatively refuted or negated an element of the greater offense, or, in the alternative (2) where the evidence on the

issue was subject to two *interpretations* and one interpretation refuted or negated an element of the greater offense. *Id.*, 840 S.W.2d 390, 392 (Tex.Cr.App. 1992). *See also*, *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex.Cr.App. 2012); *and*, *Schweinle v. State*, 915 S.W.2d 17, 19 (Tex.Cr.App.1996). While *Saunders* remains established precedent, appellate courts, in applying the criteria to evaluate the evidence, appellate courts, including this one, have often focused on the first prong of the inquiry – the presence of *affirmative* evidence to refute the greater offense. *See e.g., Wortham v. State*, 412 S.W.3d 552, 558 (Tex. Cr. App. 2013) ("such evidence cannot be mere speculation—it must consist of affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense."); *Dixon v. State*, 358 S.W.3d 250, 255 - 258 (Tex. App. - Hous [1st Dist] 2011); *and*, *Roberts v. State*, NO. 03-14-00637-CR, slip op. at 4 - 6 (Tex. App. – Austin 2016) (unpubl). This focus on affirmative evidence has obscured *Saunder*s second prong and channeled court's focus into whether there is contrary evidence directly refute the greater offense, a "hard" negation, as opposed to the broader inquiry prompted by *Saunders*.

This analysis for whether a lesser-included offense is supported by the evidence is distinct from that for legal sufficiency. For one, the evidence to support the instruction is viewed in the light most favorable to the defendant. *Bufkin v. State*,

207 S.W.3d 779, 782 (Tex. Cr. App. 2006); *and*, *Granger v. State*, 3 S.W.3d 36, 38 (Tex.Cr.App.1999). More importantly, evidence can be sufficient to support the jury's verdict as a matter of sufficiency, yet nonetheless support an instruction on a lesser-included offense. *Wasylina v. State*, 275 S.W.3d 908, 909 - 910 (Tex. Cr. App. 2009); *and*, *Schweinle*, 915 S.W.2d at 20, n.4. Anything more than a scintilla of evidence is sufficient to support instruction offense instruction. *Cavazos*, 382 S.W.3d at 385. And consistent with the principle that the jury is the ultimate fact-finder, a court may not consider the credibility of the evidence in support of a lesser-included instruction. *Hall v. State*, 158 S.W.3d 470, 473 (Tex. Cr. App. 2005); *and Saunders*, 840 S.W.2d at 391. A court should not impose itself as a thirteenth juror in evaluating the quality or strength of the evidence.

This Court has held that manslaughter can be a lesser-included offense of murder under Tex.Penal Code § 19.02(b)(2). *Roy v. State*, __ S.W.3d ___, ___ No. PD-1455-15, slip op. at 4 (Tex. Cr. App. 2017); *and*, *Cavazos*, 382 S.W.3d at 384. This is because the culpable mental state of recklessness may apply to the conduct which causes an individual's death. *Cavazos*, 832 S.W.3d at 384 ("causing death while consciously disregarding a risk that death will occur differs from intending to cause serious bodily injury with a resulting death only in the respect that a less culpable mental state establishes its commission. See Tex.Code Crim. Proc. Ann art.

37.09(3).")

Even prior to *Cavazos*, the Corpus Christi Court of Appeals explained had explained, in *Schroeder v. State*, that a lesser-included charge of manslaughter would be warranted where jurors could reasonably interpret the defendant's *mens rea* to be one of recklessness, rather than intent or knowledge:

> A manslaughter charge is required if there *is any evidence from which a jury could conclude* the defendant did not intentionally or knowingly kill an individual, *but consciously disregarded a substantial and unjustifiable risk the result would occur*. . . . "[A] defendant may be shown to be guilty only of the lesser offense if the evidence presented is subject to different interpretations." *Saunders*, 840 S.W.2d at 392.

Id., 133 S.W.3d 654, 659 (Tex. App. - Corpus Christi 2003).

Therefore, a defendant in a murder case under Penal Code § 19.02(b)(1) & (2) may be in entitled to a lesser-included manslaughter instruction where the jury *could* interpret a defendant's *mens rea*, as not simply one of specific intent to kill or seriously injure, but whether it could reasonably interpret the defendant's *mens rea* as recklessness – a conscious disregard of whether her conduct could result in serious bodily injury or death.

B. The Austin Court of Appeals incorrectly held that Petitioner was not entitled to a Manslaughter instruction because a jury would necessarily to conclude that Petitioner only had the specific intent to kill and was not reckless about whether her conduct was an act clearly dangerous to human life.

The Austin Court of Appeals upheld the trial court's denial of a lesser-included offense instruction for manslaughter. Reviewing the competing testimony at trial, the Court of Appeals focused closely upon whether the evidence *supported a finding* of the intent to kill through Petitioner's use of a knife. *Ritcherson*, 467 S.W.3d at 118 - 125. Addressing the State's alternative theory under § 19.02(b)(2), the court held the evidence left "the jury . . . free to decide that Ritcherson intended to cause serious bodily injury to Barrie when she stabbed [the decedent] . . . in the chest . . . ." *Id*., at 126. The Court dismissed, without addressing whether the *jury* could have concluded Appellant's *mens rea* to one of recklessness:

> . . pulling a knife out, that swinging the knife at another individual and stabbing the individual in the chest as a reaction to getting hit in the head, that appearing confused after stabbing someone in the chest, and that fleeing the scene immediately after stabbing someone would not support a finding of recklessness to a sufficient level that would allow a rational jury to have concluded that if Ritcherson was guilty, she was guilty of only manslaughter. Without additional evidence establishing that Ritcherson acted recklessly, Moore's testimony was insufficient to warrant an instruction on the lesser-included offense of manslaughter.

Ibid.

The court of appeal's analysis is flawed in two critical aspects: first, the court failed to apply the appropriate inquiry, dictated by *Saunders* to the evidence at trial, and second, the court plainly substituted an evidentiary sufficiency analysis, rather than one most favorable to the evidence in support of a lesser-included offense.

I. The Third Court of Appeals did not apply the lesser-included offense analysis required by *Saunders v. State*.

The court of appeals did not apply the *two* prong analysis required by *Saunders*, focusing only on the traditional first prong of the lesser-included offense analysis – whether there was affirmative evidence to negate or refute the murder charge. *See Ritcherson*, 476 S.W.3d at 117. The court neither cited *Saunders* nor acknowledge *Saunders*' second prong - whether the evidence might give rise to a reasonable interpretation by the jury which would support a conviction on the lesser charge. *Id*, 840 S.W.2d at 392. This omission is telling. As will be discussed *infra*, the lower court's decision is primarily sufficiency-of-the evidence focused, and the analysis rested largely on the presence of evidence which would directly refute the evidence which supported the jury's finding of specific intent to kill or cause serious bodily injury. *Ritcherson*, 476 S.W.3d at 118 - 128.

Yet as *Saunders* directs, evidence in support for a lesser- included charge need not call for a hard negation, but determines whether evidence may be subject to multiple interpretations, one of which might reasonably support the jury's conclusion that the defendant is guilty of the lesser offense. This analysis implicates the jury's broad discretion, as fact-finder, to make judgements on the credibility of evidence, as well as make reasonable inferences. *See Griffin v. State*, 491 S.W.3d 771, 774 (Tex. Cr. App. 2016) (acknowledging "fact finder's role [is] the sole judge of the

weight and credibility of the evidence after drawing reasonable inferences from it."); *and*, *Hooper v. State*, 214 S.W.3d 9, 14 (Tex. Cr. App. 2007).

Here, as the court of appeals recognized, *Ritcherson*, 476 S.W.3d at 118, the critical issue lay in Petitioner's intent – had she harbored the specific intent to cause death or serious bodily injury, or could her actions be reasonably intuited as reflecting her conscious disregard of the substantial risk that death might result from her actions? Proof of intent is rarely established by direct evidence. In fact, "proof of a culpable mental state generally relies on circumstantial evidence." *Dillon v. State*, 574 S.W.2d 92, 94 (Tex.Cr.App.1978). As is typical with proof based on circumstantial evidence, the determination of fact may rest on highly nuanced, or equivocal evidence. This is no less in the case of determining the question of a defendant's intent because an individual's actions may not accurately reflect one's mental state – "it is always possible that one's intents are different than what all outward appearances would indicate." *Dillon*, 574 S.W.2d at 94. Given the jury's unique role as fact-finder to evaluate ambiguous circumstances and to draw inferences from that evidence, courts should be wary in superimposing its own interpretation to the evidence. *Laster v. State*, 275 S.W.3d 512, 523 (Tex. Cr. App. 2009) ("it is within the province of the fact finder to choose which inference is most reasonable."); *and*, *Dillon*, 574 S.W.2d at 94 ("If such an inference is reasonable, it

is for the trier of fact to determine which circumstances to accept as proven and whether to draw that inference, and it is not for this Court to overturn such an inference, drawn on the whole of the circumstances . . . ").

The court of appeals failed to evaluate the evidence in light of whether the jury could have reasonably interpreted Appellant's actions to reflect a conscious disregard of the chance that death could result from her actions, as opposed to the specific intent of death or serious bodily injury. The court did not address whether the evidence relating to Petitioner's *mens rea* might have been subject to alternative interpretation of a reckless disregard that death might result from her conduct. While this failure may be attributable to the court's erroneous sufficiency-focused review, it nonetheless failed to apply *Saunders* by ignoring, in essence, the critical question posed by the case – the scope to which Petitioner's *mens rea* was debatable. In the present case, the inquiry required by *Saunders* was necessary for the accurate resolution of the case because, especially in light of the circumstances of the confrontation between Petitioner and the decedent, the issue of Petitioner's *mens rea*, prompted inquiry into whether her mental state could be subject to alternative interpretations. Plainly, the appellate court focused only on whether there was evidence of a hard negation of the charged offense; it failed to address the second inquiry - whether the evidence of Petitioner's *mens rea* was subject to two different

interpretations, one of which would negate an element of the greater offense. *Saunders*, 840 S.W.2d at 392. Had the jury concluded based on its evaluation of the circumstances, that Appellant's *mens rea* had been one or recklessness, rather than specific intent to cause the result, then, under *Saunders*, it would have negated the *mens rea* for the charged offense.

The court of appeals entirely failed to apply the proper analysis for lesser-included offenses as required by *Saunders*.

ii. The Court of Appeals incorrectly applied a sufficiency of the evidence instruction throughout its analysis of the evidence.

In addition to the court of appeals' failure to apply the analysis required under *Saunders*, the court also misapplied the standard of review for lesser-included offense instruction by substituting a sufficiency of the evidence review over the evidence at trial. This fundamentally misapplied the standard; the evidence to support a lesser-included offense instruction is viewed in the light most favorable to the defendant, not the verdict of guilty on the greater offense. *Bufkin*, 207 S.W.3d at 782. Whether the evidence would support a conviction on the greater offense is not determinative on whether evidence would support an instruction on the lesser-included offense. *Wasylina*, 275 S.W.3d at 909 - 910.

The court of appeals' analysis reflects at several points the focus on whether the evidence at trial was sufficient to support a conclusion of specific intent to cause

death or serious bodily injury:

- "in light of this evidence, and the evidence establishing that [the decedent] was stabbed, the jury *could have reasonably inferred* that Petitioner stabbed [the decedent] in the manner suggested by Henderson; *Ritcherson*, 476 S.W.3d at 125 (emphasis added);

- "assuming that the medical testimony . . . could disprove an intent to kill . . . the evidence still *could have established* that [Petitioner] . . . intended to cause serious bodily injury and committed an act clearly dangerous to human life that caused [the decedent's] death." *Id*., 476 S.W.3d at 126 (emphasis added).

- "the jury was *free to decide* that [Petitioner] intended to cause serious bodily injury to [the decedent] . . . " *Ibid* (emphasis added).

- "... as summarized above, the evidence presented at trial . . . *would have allowed the jury to conclude* that [Petitioner] intended to kill [the Petitioner] by stabbing her in the chest regardless of whether the knife was small or large in size." *Id*., at 127 (emphasis added).

- "the evidence from the witnesses *would have allowed the jury to conclude* that [Petitioner] intended to cause serious bodily injury and committed an act clearly dangerous to human life." *Id*., at 127 (emphasis added).

Id., at 127 (emphasis added).

The appellate court's repeated citations to the evidentiary support for a guilty-verdict on the murder charge plainly demonstrates the court applied a sufficiency of the evidence focused analysis in evaluating. In addressing the evidence at trial, court clearly focused on whether the evidence would have supported the jury's finding of specific intent. *Id*., at 126 - 127. This was an incorrect analysis; a determination of

whether the evidence is sufficient to support the jury's guilty verdict is distinct from one of whether a defendant is entitled to a lesser-included offense. *Wasylina*, 275 S.W.3d at 909 - 910. Instead of focusing exclusively on whether the evidence supported a finding of specific intent, as the court of appeals did in this case, the analysis should have focused upon whether the evidence might reasonably have supported the jury's finding that Petitioner's *mens rea* was one of recklessness, *e.g.*, that she consciously disregarded the likelihood that stabbing the decedent would cause death, as opposed to her specific intent to cause death or serious bodily injury. By focusing on evidentiary sufficiency, the court avoided the appropriate inquiry into whether a lesser-included offense was justified by the evidence.

Yet despite the court's near exclusive focus on the sufficiency of the evidence to support a finding of specific intent, the court incongruously addressed and minimized testimony which suggested Petitioner had acted responsively, stabbing the decedent immediately after having been struck in the head:

> In the context of the questions being asked, Moore's testimony *would seem more appropriately to be read as stating* that [Petitioner] swung her arm as a reaction to having been hit in the head rather than an assertion that [Petitioner] was somehow not in control of her behavior.

Ritcherson, 476 S.W.3d at 127 (emphasis added).

The court's departure from its sufficiency-focus in this single instance does not so much as reflect an analysis of the totality of the circumstances, but a gratuitous

opportunity to substitute the court's own credibility determination for that of the jury. As noted previously, it is the jury's role to determine a witnesses' credibility as well as the inferences to be drawn from his testimony. *Griffin*, 491 S.W.3d at 774. This is because the jury was present to hear the testimony, and evaluate the content and quality of that testimony. It is the live, first-hand quality of the jury's hearing testimony which makes it the appropriate body to determine the meaning and significance of the testimony. In construing testimony, an appellate court should not adopt the role of a thirteenth juror, a role for which it is unqualified, exception for plainly unequivocal facts.

On its face, the portion of Moore's testimony selected by the court of appeals indicated that Petitioner struck the decedent as a *reflexive* action in response to having been struck by a shoe, as opposed to a reflective action. This would tend to support an inference that Appellant did not act with specific intent, but with a reckless disregard of her actions. It was, however, for the jury to determine, when properly instructed, the significance of Moore's testimony and whether it established Petitioner acted recklessly, or whether the greater weight of the evidence reflected specific intent. The court's efforts to interpret and limit Moore's testimony ventured beyond the limits of proper appellate review.

iii. The Court of Appeals reliance upon this Court's decision in *Cavazos v. State* to conclude the evidence supported a finding of

specific intent was inapposite.

In conducting its sufficiency-focused review of the evidence, the court of appeals cited, and relied upon this Court's *Cavazos* decision. *Ritcherson*, 476 S.W.3d at 127. This reliance on *Cavazos* was inapt to Petitioner's case because the two cases are critically distinguishable. In contrast to the present case, Cavazos used a firearm, something which constitutes a deadly weapon *per se* and carried with it a "presumption" of the intent to cause death, and because he shot the decedent two times during the confrontation. *Id.*, 382 S.W.3d at 380, 385.

Firearms are unique under case precedent. The use of a firearm carries the presumption of the *specific intent* to cause death because a firearm has been designed to inflict serious bodily injury, which includes the possibility of death. *Williams v. State*, 567 S.W.2d 507, 509 (Tex. Cr. App. 1978) (use of a pistol carries with it a presumption of the intent to kill); *and*, *Watkins v. State*, 333 S.W.3d 771, 781 (Tex. App. – Waco 2010). Thus, the use of a firearm, in particular, tips the scale in favor of an intent to kill, and away from another inference. In light of the presumption, there must actually be affirmative evidence to rebut the presumption of specific intent.

More importantly, in *Cavazos*, the defendant shot the decedent *twice. Id*., 382 S.W.3d 377 at 380, 385. A single instance of pulling the trigger to a firearm may,

under the circumstances demonstrate reckless conduct, but it is difficult to construe the act of shooting a firearm *twice* during a confrontation as reflecting something other than the specific intent to kill. This is because of both the object used, a firearm, and because of the multiple instances in which the weapon is used. While it is problematic to apply a presumption of intent to kill in a non-evidentiary sufficiency context, *see e.g.*, *Francis v. Franklin*, 471 U.S. 307 (1985), for the purposes of appellate review, Cavazos' having shot the decedent *twice* rendered a lesser-included offense charge premised on a *mens rea* of *recklessness*, to be an irrational alternative. *See Cavazos*, 382 S.W.3d at 385. Under these circumstances, a reasonable jury could not have concluded that twice shooting a decedent to be reckless, as opposed to intentional conduct.

Petitioner's case is legally and factually distinct from *Cavazos*. Unlike *Cavazos,* the presumption of the intent to kill attendant to the use of a deadly weapon *per se* is lacking in the present case. *See Henry v. State*, 246 S.W.2d 891, 893 (Tex. Cr. App. 1952) ("inasmuch as the instrument . . . used was not a deadly weapon per se, no presumption of an intent to kill."). In the present case, the presumption associated with a firearm, a deadly weapon *per se* does not tip the scale toward a finding of specific intent to kill or cause serous bodily injury. Further, Petitioner stabbed the decedent a single time. Granted, the use of a knife (or other non deadly

weapon *per se*) to commit an assault could under some circumstances establish a clear and unequivocal intent to kill, and render an alternative interpretation to be irrational. *See e.g., Rushing v. State*, 50 S.W.3d 715, 729 (Tex.App. - Waco 2001) (noting that "photograph was probative of Rushing's intent to kill, *because it showed a vicious knife attack with multiple stab wounds*.")(emphasis added). But the evidence in Petitioner's case did not grant leave to the court of appeals to superimpose its own evaluation of the evidence over that of the jury. Petitioner stabbed the decedent a single time, with a knife of indeterminate size, under circumstances which would support a reasonable conclusion that she acted without deliberation, and in response to provocation. Unlike *Cavazos* this did not conclusively preclude a reasonable finding of recklessness. To the contrary, a single stab wound which ultimately resulted in death did not foreclose jurors from making a reasonable interpretation that the Petitioner's *mens rea* to have been recklessness, rather than specific intent. This inference from Petitioner's actions was well within the purview of the jury. *See Laster*, 275 S.W.3d at 523 (". . . it is within the province of the fact finder to choose which inference is most reasonable.").

The Third Court of Appeals, by disregarding *Saunders*' inquiry into the possibility of alternative interpretations of Petitioner's *mens rea* fundamentally misapplied the correct standard to review the trial court's denial of Petitioner's

requested lesser-included offense instruction. And further, the appellate court erroneously applied an evidentiary sufficiency standard to evaluate the evidence.

Conclusion and Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests this Honorable Court to reverse the Court of Appeals' decision and to subsequently grant such relief to which Petitioner may be entitled.

Respectfully submitted,

Law Office of Alexander L. Calhoun
4301 W. William Cannon Dr., B-150, # 260
Austin, TX 78749
Tele: 512/731-3159
Fax: 512/ 233-5946
Email: alcalhoun@earthlink.net

BY: /s/ *Alexander L. Calhoun*
Alexander L. Calhoun
State Bar No.: 00787187

Attorney for Petitioner, Kaitlyn Lucretia Ritcherson

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petitioner's Merits Brief has been served upon the following by United States Mail on June 22, 2017:

Travis County District Attorney's Office
P.O. Box 1748

Austin, TX 78767

and

State Prosecuting Attorney
P.O. Box 13046
Capitol Station
Austin, Texas 78711

/s/ *Alexander L. Calhoun*
Alexander L. Calhoun

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Discretionary Review was created in 14 point type, Times New Roman font, and consists of **6380** words.

/s/ *Alexander L. Calhoun*
Alexander L. Calhoun